added factor of insolvency intervenes, the aid of equity is necessary to prevent the vendee from losing both the goods and his money. Equity, therefore, makes the vendor a constructive trustee of the chattels. It interferes in this case upon the same principle that it applies in granting an injunction, upon proof of the insolvency of the promisor, to prevent the breach of a contract not to compete, although liquidated damages were contemplated as the sole relief.[4]

The most plausible argument that has been urged against specific performance of a contract of sale during the defendant's insolvency is its violation of the spirit of our bankruptcy legislation, in that it creates a preference. This contention seems untenable. If the relief is denied, the general creditors gain the undue advantage of sharing in both the purchase price and the goods at the expense of the vendee. The situation is analogous to that in cases of stoppage *in transitu*, where the seller, after parting with title and expressly giving credit, is allowed to reclaim the goods on the broad equitable principle that "the goods of one man should not be applied in payment of another man's debts."[5] The result in Holroyd *v.* Marshall[6] would be equally obnoxious to such an interpretation of the policy against preferences. It is true that a mortgage of after-acquired property differs from a contract of sale, in that it operates as a contract to give a security. Because it is specifically enforceable regardless of insolvency, it creates an equity in the goods at the moment of acquisition. But it is equally true that this equitable remedy usually becomes important only where it works to the disadvantage of other creditors of the equitable mortgagor. This supposed objection is, moreover, applicable to cases where a consciously insolvent bank receives deposits. But equity holds that so long as the deposit is traceable in the increased assets of the bank, it is subject to a constructive trust.[7] In short, equity interferes in cases of insolvency not to give the plaintiff a preference but to deny the general creditors an undeserved enrichment at his expense. And the bankruptcy courts have recognized the justice of this position.[8] A similar result might be reached when there is only part payment of the purchase price with subsequent insolvency. The vendor should not be allowed to retain both the money and the goods. He should be made mortgagee of the goods, holding them as security for the unpaid purchase price, and, upon payment, the vendee should be entitled to specific performance.

INDIVIDUAL LIABILITY OF STOCKHOLDERS AS AFFECTED BY TRANSFER OF STOCK. — Until the beginning of the nineteenth century, the corporation was regarded as holding the corporate property in trust for the stockholders;[1] and they, as *cestuis que trustent*, were bound in equity to exonerate the corporation for any excess of corporate debts over corporate

[4] See Zimmerman *v.* Gerzog, 13 N. Y. App. Div. 210.

[5] D'Aquila *v.* Lambert, 1 Amb. 399. In England, at least, this right extends even to stoppage of the proceeds of the sale to a sub-vendee while the goods are in transit. *Ex parte* Golding, 13 Ch. D. 628. But see Kemp *v.* Falk, 7 App. Cas. 573, 577.

[6] 10 H. L. Cas. 191.

[7] See Ames, Cas. Trusts, 12, *n.*; Williston, Cas. Bankruptcy, 420, *n.* 1.

[8] See Scammon *v.* Bowen, 1 Hask. (U. S. C. C.) 496; Hamilton *v.* Nat'l Bank, 3 Dill. (U. S. C. C.) 230.

[1] Hildyard *v.* South Sea Co., 2 P. Wms. 76; Drybutter *v.* Bartholomew, 2 P. Wms. 127; Sandys *v.* Sibthorpe, 2 Dick. 545. It was not until 1836, in Bligh *v.* Brent, 2 Y. & C. 268, that the modern view was adopted. See 2 HARV. L. REV. 151.

assets.[2] To-day, however, a stockholder is under no liability to creditors except by statute.[3] Where such a statute does exist, he is treated as offering to indemnify to the statutory extent any person giving credit to the company; and when such credit is given, this offer ripens into a binding contract.[4] Accordingly, a statute repealing a provision for the individual liability of stockholders is unconstitutional and void as to existing creditors.[5] On the other hand, statutes imposing liability upon stockholders cannot be retroactive,[6] and always provide that the stockholder may effect a novation of his liability by transferring his shares.[7]

This freedom from liability, however, does not follow a transfer of stock under all circumstances. Although the English courts have held that a shareholder is released from liability by an absolute conveyance of his stock, irrespective of the solvency of the corporation or transferee,[8] they have been ready to find upon slight evidence that the transfer was not genuine.[9] Furthermore, they have decided that where the directors may refuse to register a transfer, they must so refuse if the corporation and transferee are insolvent.[10] Should they knowingly register such a transfer, they would be guilty of a tort toward the creditors, and the transferrer would not be allowed to profit thereby.[11] And if the stockholder procured such registration by suppressing his knowledge of the transferee's irresponsibility, he would be guilty of fraud, and would, therefore, remain liable.[12] In this country the courts have not allowed the stockholder to escape liability by transferring his stock when such transfer is made with knowledge of the insolvency of the company and of the irresponsibility of the transferee.[13] And the Circuit Court of Appeals of the Seventh Circuit has recently decided that a stockholder in an insolvent National Bank is discharged from liability if he has transferred his stock to a person able to perform the obligations thereby cast upon him. *McDonald* v. *Dewey*, 37 Chi. Leg. N. 174.[14] Mr. Justice Grosscup dissented on the ground that one transferring his stock with knowledge of the company's insolvency should remain liable even though the transferee is solvent.

These cases present a conflict between the desire of the courts on the one hand, to protect the creditors and, on the other, to enable stock-

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[2] Salmon *v.* Hamburg, Ch. Cas. 204; Hume *v.* Windyaw, 1 Car. L. J. 217.

[3] Pollard *v* Bradley, 87 U. S. 520; Gray *v.* Coffin, 9 Cush. (Mass.) 192.

[4] Carol *v.* Green, 92 U. S. 509. But see McClaine *v.* Rankin, U. S. Sup. Ct., Mar. 6, 1905, where it was held that the individual liability of a stockholder in a national bank is statutory and not contractual for purposes of the statute of limitations.

[5] Hawthorne *v.* Calef, 2 Wall. (U. S.) 10. Such a provision, however, may be repealed as to future debts. Ochiltree *v.* Railroad Co., 21 Wall. (U. S.) 249.

[6] Fairchild *v.* Masonic Hall, 71 Mo. 526.

[7] Veiller *v.* Brown, 18 Hun (N. Y.) 571; Cleveland *v.* Burnham, 55 Wis. 598.

[8] De Pass's Case, 4 DeG. & J. 544; Queen *v.* Lambourn Co., 22 Q. B. D. 463.

[9] Costello's Case, 2 DeG. F. & J. 302; Budd's Case, 30 Beav. 143. Nor are the English courts consistent in their strict interpretation of this right to transfer, for when a transfer is made on trust for the transferrer, the latter remains liable, even though the company's deed contained a clause that trusts should not be recognized. Chinnock's Case, John. 714. Again, one transferring to an infant or to a married woman remains liable. Mann's Case, L. R. 3 Ch. 459, *n.*

[10] See Payne's Case, L. R. 9 Eq. 223; Williams' Case, L. R. 9 Eq. 225, *n.*

[11] Eyre's Case, 31 Beav. 177; Bennett's Case, 5 DeG. M. & G. 284.

[12] See *Ex parte* Parker, L. R. 2 Ch. 685.

[13] Bowden *v.* Johnson, 107 U. S. 251; Stuart *v.* Hayden, 169 U. S. 1; Earle *v.* Carson, 188 U. S. 42.

[14] Miller *v.* Gt. Republic Ins. Co., 50 Mo. 55.

holders to deal freely with their stock. Since the statutory provisions for the transferability of stock are general, this limitation is an act of judicial legislation, and the creditors should get no greater relief than justice requires. That the transferee may become insolvent is true, but the same risk exists when the company is solvent. Moreover there is the equal danger of the transferrer becoming insolvent. The decision of the majority in the principal case seems to preserve the rights of all concerned since it carries out the mercantile idea of making stock freely transferable and at the same time adequately protects creditors in their right of recourse against stockholders.

RIGHTS AND LIABILITIES UNDER OPTION CONTRACTS. — Options have been universally construed by the courts as binding agreements to keep an offer open. On this analysis, the acceptance of the option constitutes the consummation of a bilateral contract, and binds both parties. *Dicta* innumerable to this effect may be found in the cases,[1] both in actions by the holder and in actions by the giver of the option. Thus, in an Alabama case,[2] where the holder of the option attempted to withdraw after acceptance, the giver of the option was refused specific performance only because he was unable to make a good title. It has been insisted, however, that an option is not a contract to keep an offer open,[3] but a complete unilateral contract in which the obligation of the giver of the option is subject to the condition precedent of tender of payment by the holder. Under this view, of course, the latter does not become bound on notification of acceptance. The choice between the two views would seem to depend simply on the intention of the parties. This may clearly appear in the agreement; when, however, as is usually the case, it does not, the general understanding of business men should govern, which would probably favor the interpretation of the courts. Contracts for the sale of land, the usual subject of options, are generally bilateral; and it is, therefore, not unnatural to suppose that the transaction to which the option contract looks forward should be such a contract.

On either theory, however, an option is a contract, and should carry the usual rights and duties of a contract. Accordingly, it is well settled that an option to buy land will be specifically enforced. The defense of lack of mutuality which has been time and again interposed is obviously fallacious. If the option is an offer, both parties become bound by the acceptance, and the situation differs in no respect from that in an ordinary contract of sale.[4] If it is not an offer, the giver of the option can, nevertheless, no more plead lack of mutuality than the promisor in any other unilateral contract whose obligation is subject to a condition precedent. Similarly, the great weight of authority makes an option assignable. True, the option frequently runs to the assigns, but the courts do not rely on this circumstance,[5] and will enforce the option though assigns are not mentioned.[6] It is, therefore, somewhat surprising to find the West Virginia Supreme Court refusing specific performance at the suit of an assignee of an option to purchase land. *Rease* v. *Kittle*, 49 S. E. Rep. 150. The court argues that, since an option

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1 See Perry *v* Paschal, 103 Ga. 134.
2 Linn *v*. McLean, 80 Ala. 360.
3 Professor Langdell, in 18 HARV. L. REV. 1, 11.
4 See Perry *v*. Paschall, *supra*.
5 See Maughlin *v*. Perry, 35 Md. 352.
6 See Linn *v*. McLean, *supra*.